

In the Matter of)
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Requests for Refunds of Application Fees Paid by) MD Docket No. 13-163
Winning Bidders in Media Services Auctions)
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mass media services, including the FM Radio service.⁴ The Commission implemented Section 8 in 1987, adopting the fee schedule exactly as enacted by Congress.⁵

3. In 1985, when Congress passed Section 8, an applicant seeking an initial license or construction permit would have been required to submit a single long-form application containing all of the information needed to establish its qualifications to be awarded that license or permit. The statutory fee schedule accordingly provided a single fee amount for each such initial license or permit application. In 1994, however, the Commission began using a two-step application process for those licenses and permits that were to be awarded through the then-new competitive bidding mechanism. In this two-step process, which we continue to use today, every applicant seeking to participate in an auction files a short-form application, Form 175, containing only the information needed to establish eligibility to participate in the auction. Only the auction winners actually apply for the licenses or construction permits that they have won by filing the applicable long-form applications. For services that existed in 1985, like the FM Radio service, Section 8 provides a statutory fee for the long-form application, but not for the short form. (For most services that did not exist in 1985, there are no statutory application fees because Congress has not amended Section 8 to add fees for those services.) The Commission's efforts to harmonize its auction application procedures with the requirements of Section 8 are at the root of the instant dispute, and are examined in more detail in Part III of this order, below.

4. Congress granted the Commission competitive bidding authority in two separate statutes. In 1993, Congress added section 309(j) to the Communications Act, authorizing the Commission to use competitive bidding to resolve mutually exclusive applications for initial licenses in non-broadcast services.⁶ The Commission adopted its initial competitive bidding rules in 1994.⁷ At first, service-specific procedural rules were adopted for each auction, but on December 31, 1997, the Commission adopted uniform competitive bidding rules for all non-broadcast spectrum auctions.⁸

5. One of the procedural rules that the Commission adopted in 1994 for the earliest non-broadcast auctions, and then retained in the 1997 uniform rules, was section 1.2107(c), which governs submission of long-form applications. At the time that Petitioners filed their fee refund requests, section 1.2107(c) read, in relevant part, as follows:

A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. *Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications.* Specific procedures for filing applications will be set out by Public Notice. ...⁹

⁴ *Id.* Section 8 of the Act and our application fee rules use the term "mass media services," while the auction rules and associated orders use the term "broadcast services." In this order we use those terms interchangeably.

⁵ *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, Report and Order, 2 FCC Rcd 947 (1987) (*Fees Order*). The fee schedule is codified at 47 C.F.R §§ 1.1101-1.1119. Fees for mass media services applications are contained in §1.1104.

⁶ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(1)(B), 107 Stat. 388 (1993).

⁷ *See generally Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, Notice of Proposed Rulemaking, 8 FCC Rcd 7635 (1993) (*1993 Auctions NPRM*); Second Report and Order, 9 FCC Rcd 2348 (1994) (*1994 Auctions Second Report and Order*); Second Memorandum Opinion and Order, 9 FCC Rcd 7245 (1994) (*1994 Auctions Reconsideration*).

⁸ *Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures*, Third Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 374 (1997) (*Third Report and Order*).

⁹ 47 CFR § 1.2107(c) (2010) (emphasis added).

6. Congress authorized the Commission to use competitive bidding to select initial licensees in broadcast services in 1997.¹⁰ In November 1997, the Commission sought comment on what rules should apply to broadcast service auctions.¹¹ In the August 1998 *Broadcast Auction Report and Order*, the Commission adopted competitive bidding rules for broadcast service auctions; those rules are codified at 47 CFR § 73.5000 *et seq.*¹² In paragraph 164 of that order, the Commission specifically discussed the filing of long-form applications by winning bidders in broadcast auctions, stating that “[t]he statutorily established application fees will apply to the long-form applications filed by winning bidders.”¹³ The Commission supported that statement with a footnote referencing Section 8 of the Act and Section 1.1104 of the Commission’s rules, which is the rule that implements the schedule of application fees for the mass media services.

7. Although the Commission thus explicitly recognized in the *Broadcast Auction Report and Order* that winning bidders in broadcast service auctions would be subject to statutory application fees when they filed their long-form applications, the Commission did not address application fees in the Part 73 auction procedures rules themselves. The paragraph 164 language explaining the applicability of the statutory fees was not included in the summary of the *Broadcast Auction Report and Order* that accompanied publication in the Federal Register of the broadcast auction rules.¹⁴

8. The Commission held its first broadcast auction in 1999.¹⁵ In 2004, the Commission held Auction 37, the first in an ongoing series of auctions of vacant FM allotments.¹⁶ At the close of Auction 37, and of each subsequent FM auction, winning bidders were instructed by Public Notice to submit fees with their long-form applications.¹⁷ Winning bidders paid the long-form application fees without question until 2009.

9. In 2009, a high bidder in Auction 79 requested a refund of a long-form application fee, citing the “no additional fee” language in Section 1.2107(c).¹⁸ On March 3, 2011, the Commission issued a Notice of Proposed Rulemaking in conjunction with a routine rulemaking order adjusting the schedule of application fees.¹⁹ The *Order and Notice* proposed “to clarify the rules on the payment of filing fees by

¹⁰ Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997).

¹¹ *Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings*, Notice of Proposed Rulemaking, MM Docket No. 97-234, 12 FCC Rcd 22363 (1997).

¹² *Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, MM Docket No. 97-234 et al., 13 FCC Rcd 15920 (1998) (*Broadcast Auction Report and Order*). Under §73.5000(a), the general competitive bidding procedures contained in Part 1 of the Rules apply to broadcast auctions except as modified by the broadcast-specific provisions in Part 73.

¹³ *Broadcast Auction Report and Order* at 15984 (footnote omitted, emphasis supplied).

¹⁴ See 63 Fed. Reg. 48615, 48618 (Nov. 10, 1998).

¹⁵ See *Closed Broadcast Auction No. 25 Closes*, Public Notice, 14 FCC Rcd 17186 (1999).

¹⁶ See *FM Broadcast Construction Permits Auction Closes*, Public Notice, 20 FCC Rcd 1021 (2004) (*Auction 37 Closing Public Notice*). The earliest broadcast auctions involved long-form applications that were pending prior to the adoption of the broadcast auction procedures. In Auction 37, and in the subsequent FM auctions in which the various Petitioners were winning bidders, short form applications could be filed only after the announcement of the auction, and long-forms were to be filed only by the auction winners. See 47 CFR § 73.3573(f)(2).

¹⁷ See, e.g., *Auction 37 Closing Public Notice* at 1025; *Auction of FM Broadcast Construction Permits Closes*, Public Notice, 22 FCC Rcd 518, 523 (2007) (*Auction 68 Closing Public Notice*).

¹⁸ Letter from Lauren A. Colby, counsel for Mildred R. Porter, to Steven VanRoekel, Managing Director, FCC (Oct. 21, 2009).

¹⁹ *Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1109 of the Commission’s Rules*, Order and Notice of Proposed Rulemaking, GEN Docket No. 86-285, 26 FCC Rcd 2511 (2011) (*Order and*
(continued....)

winning bidders in auctions of construction permits in the broadcast services in conjunction with their long-form applications”²⁰ by revising Section 1.2107(c) to read “*Except as otherwise provided in Section 1.1104 of the rules*, high bidders need not submit an additional application fee with their long-form applications.”²¹ No comments or reply comments were filed. The Commission adopted the amended rule, which became effective on June 28, 2011, upon publication in the Federal Register.²²

10. While the *Order and Notice* was pending, Commission staff granted the initial fee refund request with the notation “not required to pay fee.” Three more refund requests were also granted by the staff. Staff then stopped granting refunds, but, as broadcast auction winners became aware that some refunds had been granted, the number of parties filing refund requests grew.

11. On March 27, 2013, the Commission’s CFO issued letters denying each pending refund request and letters demanding return of the four refunds that had been granted. The CFO’s decisions relied on paragraph 164 of the *Broadcast Auctions Report and Order* for the proposition that winning bidders in media service auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application. The CFO stated that each requester had actual and timely notice of that requirement and that the requesters were therefore bound by it.²³ Forty-two requesters filed Applications for Review or Petitions for Reconsideration of the CFO’s rulings.²⁴

12. Also on March 27, 2013, the Commission published in the Federal Register a correction to the Federal Register summary of the *Broadcast Auction Report and Order*.²⁵ Effective April 26, 2013, the corrected Federal Register summary of that rulemaking order contains the Commission’s statement in paragraph 164 explaining that statutory long-form application fees apply to winning bidders in broadcast auctions.

III. DISCUSSION

13. We deny the applications for review because we are required by Section 8 of the Act to collect the fees that they challenge. Petitioners assert strenuously that Section 1.2107(c) of the rules removed that requirement for licenses and permits won at auction, but they are mistaken.

14. In the *Fees Order* the Commission explained the constraints on its authority to change the requirements of Section 8 of the Act: “...these fees are now statutory law and may be changed only through a future action by the Congress.”²⁶ We would have exceeded our authority if we had later adopted a rule with the meaning that Petitioners ascribe to Section 1.2107(c), that is, a rule that excused all auction winners from paying the fees that apply by statute to their license or construction permit applications. Furthermore, as discussed below, the language and history of Section 1.2107(c) show that the provision relied on by Petitioners was actually adopted for the limited purpose of protecting auction

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Notice). Section 8(b) of the Act directs the Commission to adjust the fee schedule every two years to reflect changes in the Consumer Price Index. 47 U.S.C. § 158(b).

²⁰ *Id.* at 2512.

²¹ *Id.* (emphasis supplied).

²² *Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1109 of the Commission’s Rules*, Second Order, 26 FCC Rcd 9055 (2011), *petitions for recon. pending*.

²³ An example of the CFO’s letters is in Appendix B to this order.

²⁴ See Appendix A.

²⁵ 78 Fed.Reg. 18527 (March 27, 2013).

²⁶ *Fees Order*, 2 FCC Rcd 947, 948-9 (explaining why the Commission was not considering any of the comments that were filed seeking changes in the amounts of the fees or challenging the relationship of fees to processing costs).

winners from the possibility of being required to pay the statutory application fee twice for the same license or permit.

15. We look first to the language of the rule. The relevant provision of Section 1.2107(c) states that, notwithstanding any other provision of our rules, “high bidders need not submit an *additional* application filing fee with their long-form applications.”²⁷ This provision can only apply to an applicant that has already paid one application filing fee for its permit application, as there can be no “additional” fee if one fee has not already been submitted. On its face, then, the provision appears to have no relevance for applicants such as Petitioners, who were assessed only one application filing fee per construction permit for each permit that they won at auction.

16. Examination of the history of Section 1.2107(c) confirms this interpretation of the rule language. In the *1993 Auctions NPRM*, the Commission proposed that each applicant seeking to participate in an auction would submit both a short-form application and a long-form application, together with an application filing fee.²⁸ For older services, the long-form application was to be made on the existing form, and the fee was to be the applicable Section 8 fee.²⁹ For the new Personal Communications Services (PCS), which had no Section 8 long-form application fees because the services did not exist in 1985, the Commission proposed specific fees for the short-form applications.³⁰ Under this scheme, all short-form applications would have been processed to determine eligibility for the auction, but the long-form applications, although filed upfront by all applicants, would have been processed only for the auction winners. In a footnote, the Commission stated that “no additional fee” would be needed for the second part of the application.³¹ No proposed rule text was included in the *1993 Auctions NPRM*.

17. In May 1994, in the *1994 Auctions Second Report and Order*, the Commission decided that all prospective bidders would submit the short-form application along with any required fee, with the fee being based on the Section 8 statutory application fee for the relevant service.³² Only the high bidders would be required to submit the long-form application. The Commission determined to codify these decisions as follows:

§1.2105(a) *Submission of Short Form Application (FCC Form 175)*. In order to be eligible to bid, an applicant must timely submit a short form application (FCC Form 175) together with any appropriate filing fee set forth by Public Notice. ...

....

§1.2107(c) A high bidder that meets its down payment obligations in a timely manner must ... submit an additional application (the “long-form application”) pursuant to the rule governing the service in which the applicant is the high bidder. ...Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications.³³

²⁷ 47 CFR § 1.2107(c) (emphasis added).

²⁸ *1993 Auctions NPRM*, 8 FCC Rcd at 7651, para. 97.

²⁹ *Id.* at 7651, n.90.

³⁰ *Id.* at 7657, para. 129.

³¹ *Id.* at 7651, n.84.

³² *1994 Auctions Second Report and Order*, 9 FCC Rcd at 2376, para. 165 and n.122. As explained in paragraph 18, below, the Commission soon recognized that it did not have express statutory authority to impose short form fees, and therefore never collected them.

³³ *Id.* at 2409.

There is no discussion in the text of the *1994 Auctions Second Report and Order* of the “no additional fee” language in section 1.2107(c). The intent of that provision is, however, apparent when it is read together with the requirement that the Section 8 fee be submitted with the Form 175 *short-form* application. Sections 1.1102-1109 of the rules link the Section 8 filing fees to specific forms, with the filing fees for initial license and permit applications linked to the forms specified for *long-form* applications (Forms 301 and 159 for Commercial FM Radio Construction Permits). Absent the “no additional fee” provision of Section 1.2107(c), a literal reading of Sections 1.1102-1109 would have required high bidders who had submitted a Section 8 fee with their Form 175 short-form applications to then pay a *second* Section 8 fee with their long-form applications.

18. The decision to collect application filing fees with the short-form applications was challenged in a petition for reconsideration of the *1994 Auctions Second Report and Order*.³⁴ The petitioner asserted that, because there was no provision in Section 8 of the Act for the new short-form application, the Commission lacked the authority to assess a fee for that application.³⁵ The Commission responded as follows:

The Commission has requested express statutory authority to impose section 8 application fees for short-form applications. In the absence of such express authority, we do not currently impose fees for short-form applications. *However, long-form applications in most services are subject to fees under section 8.* Consequently we find [the] petition to be moot, and we dismiss it.³⁶

Congress, however, never gave the Commission authority to assess filing fees upon auction short-form applications, and such fees have never been collected. Thus, although the “need not submit an additional application fee” provision of Section 1.2107(c) has remained a part of our rules, the circumstances addressed by that provision have never come into being. Petitioners, like all others who have participated in our spectrum auctions, were assessed no application filing fees with their short-form applications. The fees that Petitioners were required to submit with their long-form applications were, therefore, not “additional application fees,” and were not within the purview of Section 1.2107(c).

19. Accordingly, we find that the fees at issue in the pending applications for review cannot be refunded because the fees were required by Section 8 of the Act and Section 1.1104 of the rules, and were not barred by Section 1.2107(c) of the rules.

20. In reaching our determination, we have not followed the same rationale that the CFO used in denying Petitioners’ refund requests. The CFO letters treated the explanatory statement in paragraph 164³⁷ of the *Broadcast Auction Report and Order* as though it were an uncodified rule that was properly adopted by the Commission but not published in the Federal Register. The letters therefore relied on demonstrating that the paragraph 164 “rule” requiring payment of application fees was effective with respect to Petitioners because they had actual notice of it.³⁸ Petitioners, in turn, focused their applications for review and petitions for reconsideration on challenging the CFO’s analysis. Because we do not adopt the CFO’s analysis, we do not address the various arguments put forth by Petitioners. We do, however, ratify the actions taken by the CFO to recover the refunds that were issued erroneously by agency staff. Because the Commission was required by law to collect the application fees at issue, it was also the

³⁴ See *1994 Auctions Reconsideration*, 9 FCC Rcd 7245, 7253, paras. 45-46.

³⁵ *Id.* at 7253, para.45.

³⁶ *Id.* at 7253, para. 46 (emphasis added).

³⁷ See paras. 6-7, *supra*.

³⁸ See generally 5 U.S.C. § 552(a)(1) (“Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.”)

Commission's duty to recover for the Treasury those fees that were erroneously returned to the applicants.³⁹

IV. ORDERING CLAUSES

Accordingly, IT IS ORDERED, pursuant to Section 8 of the Communications Act of 1934, as amended, 47 U.S.C. § 158, and Section 1.1104 of the Commission's Rules, 47 CFR §1.1104, and Sections 1.106 and 1.115 of the Commission's Rules, 47 CFR §§ 1.106 and 1.115, that the Applications for Review and Petitions for Reconsideration assigned to MD Docket No. 13-163 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁹ See *United States v. Wurts*, 303 U.S. 414, 415-16 (1938); *Amtec Corp. v. United States*, 69 Fed. Cl. 79, 88 (2005), *aff'd* 239 Fed. Appx. 585 (Fed. Cir. 2007); *Aetna Casualty and Surety Co. v. United States*, 208 Ct. Cl. 515, 526 F.2d 1127 (Fed. Cir. 1975), citing *Fansteel Metallurgical Corp. v. United States*, 172 F. Supp. 268, 270 (Ct. Cl. 1959) ("When a payment is erroneously or illegally made... it is not only lawful but the duty of the Government to sue for a refund thereof...").

APPENDIX A

Parties filing Applications for Review assigned to MD Docket No. 13-163

A & J Media LLC
Absolute Communications, LLC
Airen Broadcasting Company
Bott Communications, Inc.
California Radio Partners
Sheila Callahan & Friends, Inc.
Champlin Broadcasting, Inc.
Cochise Media Licenses, LLC
College Creek Broadcasting, Inc.
E-String Wireless, Ltd.
Edward Paul De La Hunt
Delta Media Corporation
William C. Doleman
Julie Epperson
Fox Radio Network, LLC
Georgia-Carolina Wireless, LLC
Georgia Eagle Broadcasting, Inc.
Grenax Broadcasting III, LLC
Hispanic Target Media, Ramar Communications, and Simon T (filing jointly)
Horizon Christian Fellowship
Independence Media Holdings, LLC
JAB Broadcasting, LLC
Keystone Broadcasting Corporation
Legacy Communications, LLC
Mattox Broadcasting, Inc.
Pampa Broadcasters, Inc.
Porter Hogan Charitable Trust #1
Programmers Broadcasting, Inc.
RadioJones, LLC
Richland Reserve, LLC
Skywest Media, LLC
Stroh Communications Corporation
Howard C. Toole
Tri State Radio, LLC
Virtues Communications Network, LLC
Western Pacific Broadcast LLC
Williston Community Broadcasting Corporation

Parties filing Petitions for Reconsideration assigned to MD Docket No. 13-163

Catholic Radio Network, Inc. (KEXS-FM)

Catholic Radio Network, Inc. (KPIO-FM)

Richard Comras

Janet Jensen

Gary Katz

APPENDIX B

Dear :

This responds to your August 1, 2011 request for refund of a \$20,860.00 application fees paid by [Applicant] in conjunction with the filing of long form construction permit applications (FCC Form 301) following the conclusion of Auction No. 62. For the reasons stated below, payment of the fees was correct and no refund is warranted.

You contend that no filing fees were required pursuant to section 1.2107(c) of the rules, which states that high bidders in spectrum auctions need not submit an additional application fee notwithstanding any other provision of our rules. Section 1.2107(c) is one of the uniform competitive bidding rules that the Commission adopted in 1997 for non-broadcast spectrum auctions. *Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rulemaking in WT Docket No. 97-82 and ET Docket No. 94-32*, 13 FCC Rcd 374 (1997) (*Third Report and Order*). The Commission stated that the rules adopted in the *Third Report and Order* would apply to all auctionable services, unless the Commission determined that with regard to particular matters the adoption of service-specific rules was warranted. *Id.* at 382.

The Commission subsequently adopted service-specific rules for broadcast service auctions in 1998, and stated that those rules would apply to all broadcast service auctions. *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, First Report and Order*, 13 FCC Rcd 15920, 15923 (1998) ("*Broadcast Auction Report and Order*"). At paragraph 164 of the *Broadcast Auction Report and Order* the Commission stated that winning bidders' Form 301 applications should be filed pursuant to the rules governing the relevant broadcast service and according to any procedures set out by public notice, and specifically stated that the statutorily established application fees would apply to the long-form applications filed by winning bidders. *Id.* at 15984.

The Public Notice issued after the close of Auction 62 provided that "In accordance with the Commission's rules, electronic filing of FCC Form 301 must be accompanied by the appropriate application filing fee," and referenced the fee requirement contained in Paragraph 164 of the *Broadcast Auction Report and Order. Auction of FM Broadcast Construction Permits Closes*, 21 FCC Rcd 1071, 1076 (2006) (*Auction 62 Closing Notice*). In compliance with the *Broadcast Auction Report and Order* and the *Auction 62 Closing Notice*, HCF paid the fees at the prescribed time and in the correct amount. This demonstrates that HCF had actual and timely knowledge of the requirement that winning bidders in media service auctions must pay the prescribed application fee when filing a Form 301 long-form construction permit application. A party with actual and timely notice of a requirement is bound by its terms. *See United States v. Mowat*, 582 F.2d 1194, 1201-02 (9th Cir. 1978); *United States v. Aarons*, 310 F.2d 341, 348 (2nd Cir. 1962).

We also note your reference to the fact that a refund of a Form 301 application fee had previously been made to a winning bidder in a media service auction and your argument that such refund constitutes a direct precedent for granting this refund request. The refund you cite was made in error and the Commission is seeking return of the refunded amounts to assure that all winning bidders in broadcast auctions comply with the fee payment requirement adopted in the *Broadcast Auction Report and Order* and promulgated in the auctions' closing Public Notices. Absent a statutory barrier, not present here, the Government must recover funds which its agents have wrongfully, erroneously, or illegally paid. *United States v. Wurts*, 303 U.S. 414, 415-16 (1938); *Amtec Corp. v. United States*, 69 Fed. Cl. 79, 88 (2005), *aff'd*, 239 Fed. Appx. 585 (Fed. Cir. 2007); *Aetna Casualty and Surety Co. v. United States*, 208 Ct. Cl. 515, 526 F.2d 1127 (Fed. Cir. 1975), *citing Fansteel Metallurgical Corp. v. United States*, 172 F.Supp. 268, 270 (Ct. Cl. 1959) ("When a payment is erroneously or illegally made...it is not only lawful but the duty of the Government to sue for a refund thereof..."). Moreover, the erroneous refund made in this case

neither binds the Commission in this matter nor requires it to make further refunds. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 428 (1990); *Vernal Enterprises, Inc. v. FCC*, 335 F.3d 650, 665 (D.C. Cir. 2004); and see *WLOS TV, Inc. v. FCC*, 932 F.2d 993, 995 (D.C. Cir. 1991) (Commission may depart from policy set in a previous adjudication if it provides a reasoned analysis showing that a prior policy is being deliberately changed, not casually ignored).

For these reasons your request for refund of the application fees is denied.

Mark Stephens
Chief Financial Officer